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Walter T. Stewart; Defendant-Appellant.

Richard Richards; Attorney for plaintiff-Respondent.

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IN THE SUPREME COURT OF THE STATE OF UTAH

GARY J. WITHERSPOON,

Plaintiff-Respondent,

vs.

WALTER T. STEWART, et al.,

Defendant-Appellant.

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Case No. 14285

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13 JUN 1977

BRIEF OF RESPONDENT

BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

Appeal from the Judgment of the Fourth Judicial
Court of the State of Utah, in and for Utah County

The Honorable Allen B. Sorenson, Judge

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FILED

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Clark, Supreme Court, Utah

TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF THE NATURE OF THE CASE	1
DISPOSITION OF CASE IN LOWER COURT	1
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
ARGUMENT	
POINT I - THE TRIAL COURT WAS CORRECT IN FINDING THE PLAINTIFF TO BE THE SOLE OWNER OF THE CATTLE AND THAT NO LEGAL BASIS EXISTED UPON WHICH THE DEFENDANT-APPELLANT STEWART COULD CLAIM TITLE.	6
POINT II - THE TRIAL COURT WAS CORRECT IN FINDING THAT THE BILL OF SALE BETWEEN AMERICAN FEDERAL CORPORATION AND THE DEFENDANT WALTER STEWART FAILS TO COMPLY WITH THE EXPRESS REQUIREMENTS OF 4-13-17 UTAH CODE ANNOTATED, 1953.	7
POINT III - THE TRIAL COURT WAS CORRECT IN FINDING THAT THE ALLEGED SALE FROM WHICH DEFENDANT STEWART CLAIMS TITLE WAS VOID FOR FAILURE TO SECURE A BRAND INSPECTION CERTIFICATE.	9
POINT IV - THE CASE OF WILSON V. BURROWS RELIED UPON BY DEFENDANT-APPELLANT DOES NOT APPLY TO THE PRESENT CASE.	10
CONCLUSION	12
CERTIFICATE OF MAILING	14

AUTHORITIES CITED

CASES

Pugh vs. Stratton, 22 Utah 2d 190, 450 P.2d 463, 1969	8
Galeppi v. C. Swanston & Son, 107 Cal. App. 30, 290 Pac. 116, 1930	8

CASES (Continued)	<u>Page</u>
Wilson v. Burrows, 27 Utah 2d 436, 497 P.2d 240 (1972)	10
STATUTES	
Utah Code Annotated, Title 4-13-11, (1953)	6
Utah Code Annotated, Title 4-13-17, (1953)	7
Utah Code Annotated, Title 4-13-1, (1953)	7
Utah Code Annotated, Title 4-13-66, (1953)	9
Utah Code Annotated, Title 4-13-77.5	9
Utah Code Annotated, 70A-9-302	11

IN THE SUPREME COURT OF THE STATE OF UTAH

GARY J. WITHERSPOON,)	
)	
Plaintiff-Respondent,)	Case No. 14285
)	
vs.)	
)	
WALTER T. STEWART, et al.,)	
)	
Defendant-Appellant.)	

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Plaintiff-Respondent GARY J. WITHERSPOON sued defendants and prayed for judgment declaring the \$1,500.00 paid by JERRY YECK forfeited as liquidated damages as provided in the contract of sale, and for a Writ of Replevin requiring the return of certain cattle and that he, GARY J. WITHERSPOON, be declared sole owner of said property.

Defendant-Appellant, WALTER STEWART, answered praying that the Court find him sole owner of the cattle.

FIRST SECURITY BANK intervened and asserted a security interest in the cattle.

DISPOSITION OF CASE IN LOWER COURT

Intervenor, FIRST SECURITY BANK, was granted a summary judgment upon its secured interest and was awarded

first priority on the proceeds of the sale of the cattle.

The case was tried upon the issue of whether Defendant-Appellant, WALTER STEWART, was a bona fide purchaser and entitled to recover against Plaintiff-Respondent, GARY WITHERSPOON. The Court granted judgment for the Plaintiff-Respondent and against the Defendant-Appellant.

RELIEF SOUGHT ON APPEAL

Plaintiff-Respondent, GARY J. WITHERSPOON, seeks affirmance of the trial court's judgment.

STATEMENT OF FACTS

On or before the 18th day of February, 1974, JERRY YECK approached the plaintiff, GARY J. WITHERSPOON, and asked to purchase his cattle, consisting of 19 steers and 16 heifers. He offered to pay to the plaintiff \$12,325.00. The plaintiff and JERRY YECK entered into an agreement whereby the plaintiff agreed to sell and JERRY YECK agreed to buy the cattle for the sum of \$12,325.00. Said sum was paid over to the plaintiff by JERRY YECK in the form of two checks drawn on Zions First National Bank, one for the sum of \$11,450.00 and a second check drawn in the sum of \$815.00. At or about the same time as the delivery of checks, the Plaintiff-Respondent delivered to JERRY YECK a Bill of Sale consisting of four pages, dated February 18, 1974, and a three-page supplement to the Bill of Sale, all of which were admitted in evidence upon

stipulation of counsel.

On the 20th day of February, 1974, the plaintiff contacted Zions First National Bank to secure payment on the two checks and was informed that the checks were not good, that the account had been closed. Thereafter, the Plaintiff-Respondent contacted JERRY YECK and informed him that the checks had not been paid upon presentation and that JERRY YECK was not to remove the cattle from their corral and that the plaintiff wanted a return of the Bill of Sale. The Plaintiff-Respondent secured a return of the original Bill of Sale on the 20th day of February, 1974, and has maintained the original in his possession since that time.

At the time of the transaction and continuously thereafter, GARY J. WITHERSPOON owned and possessed the Utah State Department of Agriculture Certificate of Registration on the cattle in question. The original Certificate of Registration on the cattle in question. The original Certificate of Registration was offered and accepted as an exhibit without objection. At all times during the transaction between the 18th day of February, 1974, and the 24th day of February, 1974, the cattle remained in their respective corrals at Mills, Utah and Fayette, Utah.

Upon determination that the checks had been dishonored at the bank, GARY J. WITHERSPOON notified the

defendant JERRY YECK, that the cattle were to remain in their corrals; he further notified the Utah County Sheriff's Department, the Utah State Highway Patrol, the Utah County Attorney's Office, and the First Security Bank. The purpose of his calls was to retain possession of the cattle and to alert all persons or organizations that may have an interest that someone may attempt to remove the cattle and they were not authorized to do so.

GARY J. WITHERSPOON had not authorized anyone to either show his cattle or assist anyone in removing the cattle from the corrals at Fayette or Mills.

On or about the 21st day of February, 1974, which was a Thursday, VIRGIL REDMOND, JERRY YECK and others journeyed to Fayette and Mills to look at the cattle, and upon having done so contacted the Defendant-Appellant, WALTER STEWART, by telephone and offered to sell the cattle to him. Thereafter WALTER STEWART examined the cattle in Fayette and Mills and determined he wanted to make a purchase and entered into an agreement with VIRGIL REDMOND who at said time was acting as a sales representative for PHILLIP GEORGE. The parties came to an agreement whereby the cattle were to be sold for the sum of \$8,500.00.

At the time of the negotiations, VIRGIL REDMOND represented to WALTER STEWART that he had a Bill of Sale from GARY J. WITHERSPOON, and VIRGIL REDMOND displayed the

Bill of Sale from Deseret Distributing Company to American Federal Corporation, and delivered a copy of a Bill of Sale dated February 20, 1974, from American Federal Corporation to WALTER STEWART. At no time did WALTER STEWART see the original Bill of Sale from GARY J. WITHERSPOON to JERRY YECK. On the 21st day of February, 1974, WALTER STEWART, in the company of VIRGIL REDMOND and other persons, went to the bank and WALTER STEWART secured a cashier's check in the sum of \$8,500.00, cashed the check and delivered the cash to VIRGIL REDMOND, who in turn delivered the cash to PHILLIP GEORGE.

Thereafter on the 24th day of February, 1974, WALTER STEWART began loading the cattle on his vehicle, at which time a SETH MCPHERSON, who was operating the ranch upon which the cattle were located, notified GARY J. WITHERSPOON of the attempted removal. Witherspoon informed him that the removal was unauthorized, and notified the Utah County Sheriff's Department, Highway Patrol, Utah County Attorney's Office and the First Security Bank. At the request of GARY J. WITHERSPOON the cattle were confiscated by the Utah County Sheriff's Office, impounded, and ultimately disposed of to First Security Bank, who held a security interest in said cattle.

At no time during the period February 18, 1974, until the cattle were confiscated, did any of the parties hereto or any other person attempt to secure a brand

inspection on the cattle, and when the Defendant-Respondent WALTER STEWART attempted to remove the cattle from Mills, it was his intention to transport the cattle from Juab County to Utah County, or from one branding district to another.

ARGUMENT

POINT I

THE TRIAL COURT WAS CORRECT IN FINDING THE PLAINTIFF TO BE THE SOLE OWNER OF THE CATTLE AND THAT NO LEGAL BASIS EXISTED UPON WHICH THE DEFENDANT-APPELLANT STEWART COULD CLAIM TITLE.

It is uncontroverted that the plaintiff, GARY J. WITHERSPOON, was at the time of the alleged transaction, and is still the owner of the Utah State Department of Agriculture Certificate of Registration. Title 4-13-11, Utah Code Annotated 1953, provides:

"The certified copy of recordation thus secured in the foregoing section shall be prima facie evidence of the ownership of such animal or animals by the party whose brand and mark it might be and shall be taken as evidence of ownership in all courts of law or equity, or in any criminal proceedings when the title to the animal is involved or property to be proved."

Witherspoon did not transfer his brand at any time, and maintained the Certificate of Recordation in his possession throughout the transaction and delivered the original to the Court at the time of trial, which was marked and recieved as an exhibit.

POINT II

THE TRIAL COURT WAS CORRECT IN FINDING THAT THE BILL OF SALE BETWEEN AMERICAN FEDERAL CORPORATION AND THE DEFENDANT WALTER STEWART FAILS TO COMPLY WITH THE EXPRESS REQUIREMENTS OF 4-13-17 UTAH CODE ANNOTATED, 1953.

Title 4-13-17, UCA 1953, was designed specifically to combat the problem of cattle rustling, or livestock theft. The Act provides among other things that the certified copy of the Brand Certificate is evidence of ownership, as hereinbefore mentioned and said statute further provides the precise manner in which brands or brand marks may be transferred.

The Utah Livestock Brand and Anti-Theft Act, (UCA 4-13-1, et sec.) further specifies with particularity all requirements of a Bill of Sale for the transfer of livestock. 4-13-17 states,

"Upon the sale, consignment, alienation or transfer of title of any livestock, by any person in this state, the actual delivery of such animals shall be accompanied by a written bill of sale from the vendor or the party selling to the party purchasing giving the number, sex, brands, and marks of each animal, date and place of purchase, signature and address of both seller and purchaser; provided, that any person so selling or transferring title to said livestock which are branded and marked with any brand and mark not the recorded brand and mark of person selling, shall provide proof of ownership from whom the livestock was purchased and the length of time held in his possession."

The Bill of Sale between American Federal Corporation and WALTER STEWART did not comply with the statute in the following particulars:

1. The Bill of Sale did not accompany actual

delivery of the animals.

2. The Bill of Sale does not provide proof of ownership marked by a brand not that of the vendor.

3. The Bill of Sale does not record the length of time the vendor held the cattle in his possession.

4. The Bill of Sale did not contain the signatures and addresses of both the seller and the purchaser.

The identical deficiencies occur in the Bill of Sale between Deseret Distributing Corporation and American Federal Corporation. Therefore, each sale from the Plaintiff-Respondent through the two corporations to WALTER STEWART failed to comply with the Livestock Brand and Anti-Theft Act, which was designed to protect the public and prevent illegal sale of livestock. The Act was designed to protect the defendant Stewart from the very problem now before the Court.

In Pugh vs. Stratton, 22 Utah 2d 190, 450 P.2d 463, 1969, the Utah Court held at page 466:

"Nevertheless, the mandate of the statute is clear. A transfer of title is valid only if effected in conformity with Section 4-13-17, UCA 1953."

In Galeppi vs. C. Swanston & Son, 107 Cal. App. 30, 290 Pac. 116, 1930, the California Court reached the same conclusion. In that case the plaintiff gave possession of his cattle to one Charles King for a check for the purchase

price. The plaintiff refused to give a Bill of Sale until the check was honored. The defendants in the case bought the cattle from King. Plaintiff commenced an action for conversion of the cattle against the defendants when the check was dishonored. King had left for parts unknown, just as the unserved named defendants have in the present case. The California Court held that the sale was void because where a statute is designed for the protection of the public and prescribes a penalty, that penalty is equivalent to an express prohibition and a contract in violation of its provisions is void.

This is the identical situation in Utah. UCA 4-13-66 provides,

"Any person who violates any provision of this Act shall be guilty of a misdemeanor except as herein otherwise provided."

When WALTER STEWART entered into a contract for the purchase of cattle, but did not conform to UCA 4-13-77, he entered into a contract that was void in law and therefore received no title.

POINT III

THE TRIAL COURT WAS CORRECT IN FINDING THAT THE ALLEGED SALE FROM WHICH DEFENDANT STEWART CLAIMS TITLE WAS VOID FOR FAILURE TO SECURE A BRAND INSPECTION CERTIFICATE.

The Utah Livestock Brand and Anti-Theft Act, at Section 4-13-77.5 specifically provides:

"All changes of ownership through private sales or transactions, or at public auctions or commission houses, shall be accompanied by a brand inspection certificate."

In the present case, no brand inspection certificate accompanied either the sale between American Federal Corporation and WALTER STEWART or the sale between Deseret Distributing Corporation and American Federal Corporation or Witherspoon and Yeck. At the time of trial, defendant Stewart acknowledged that the cattle were to be transferred from one brand inspection district to another, in violation of Title 4-13-28, UCA, which provides,

"It shall be unlawful for any person to transport by truck any livestock originating at any point within a district to a point beyond the boundaries of said district until the same shall have been duly inspected or written authority given by the board or by one of its authorized inspectors, to transport subject to inspection at some station en route as hereinafter required by this Act."

In Pugh vs. Stratton, the Court stated that the sale was void where the statute was designed for the protection of the public and prescribes a penalty, that penalty is equivalent to an express prohibition, and the contract in violation of its provisions is void.

POINT IV

THE CASE OF WILSON V. BURROWS RELIED UPON BY DEFENDANT-APPELLANT DOES NOT APPLY TO THE PRESENT CASE.

The case of Wilson v. Burrows, 27 Utah 2d 436, 497 P.2d 240 (1972) is readily distinguished from the

present situation.

In Wilson, the contest is between a conditional vendor of real property and a bank as a subsequent secured party. The vendors sold real estate, cattle, and other items under a uniform real estate contract. The vendee then pledged the cattle described under the contract to a bank as collateral for a loan, as specifically allowed by the real estate contract. The bank perfected its security interest in accordance with UCA 70A-9-302. The vendors of the property some months later also perfected. The question before the court was which party had the prior security interest in the cattle.

On the basis of the provisions of the Uniform Commercial Code as adopted in UCA 70A, the court ruled for the bank. The vendor tried to assert the provisions of the Utah Livestock Brand and Anti-Theft Act, Section 4-13-1, et seq., UCA 1953.

The court held its provisions did not apply to this situation concluding that, "In any event, the [vendors] cannot now claim that their contracts entered into with [the vendee] were not made in good faith."

The differences between Wilson and the present case are vital and extreme. In Wilson, the vendor specifically provided for the cattle to be released to the vendee for the purpose of allowing a third party to acquire a

secured interest. In the present case the vendor promised to release the cattle only on fulfillment of a condition precedent namely to pay the full purchase price.

In Wilson, the vendor had to assert his own bad faith in order to void the sale. In the present case all that is asserted is the bad faith of the Plaintiff-Respondent's vendee.

In Wilson, the cattle form part of the financing arrangement of real property. In the present case the cattle are the sole subject of sale.

In Wilson, to allow the vendor to make the contract and then assert its voidness because of the vendor's personal neglect in filing a security agreement would offend justice. In the present case the Plaintiff-Respondent is claiming the protection of a law designed to cover and protect both himself and the Defendant-Appellant.

A crucial difference between Wilson and the present case is that had the vendor in Wilson complied fully with the Act the result reached by the Court would have been the same because the result was determined by the Uniform Commercial Code. Had the Defendant-Appellant, Stewart, complied with the Act he would have discovered that the people he purchased from did not have good title.

CONCLUSION

The unserved named defendants are clearly the most blame worthy in this case. If the police could find them they would be subject to more than civil liability.

The present case presents the problem of choosing between two innocent parties. The primary question is, who was in the better position to discover the fraud of the unserved defendants.

Plaintiff-Respondent, Witherspoon, did all he could to prevent taking of the cattle as soon as he realized the checks had been dishonored. He recovered possession of the contract and Bill of Sale given to Yeck. He informed Yeck, the sheriff and the bank that the cattle were not to be moved. He did all that he reasonably could to prevent transfer of the cattle.

Defendant-Appellant Stewart could have discovered the fraud of the other defendants had he complied with the statute. If he had secured a proper Bill of Sale he would have known that Yeck and the others never had possession or title to the cattle. He was told by Seth McPherson at the time he seized the cattle that Witherspoon was asserting title.

If Stewart had secured a brand inspection as required by statute, he would have known that title still rested in Witherspoon and not in any of the parties with whom he dealt. Clearly Defendant-Appellant Stewart was under obligation to comply with the statutes designed to protect him from just this type of happening.

Plaintiff-Respondent, GARY J. WITHERSPOON, is therefore entitled to have the judgment of the lower court affirmed.

Respectfully submitted this _____ day of March,
1976.

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CERTIFICATE OF MAILING

I hereby certify that I mailed two copies of
the foregoing Brief of Respondent to Walter T. Stewart,
pro se, RFD #2, Box 199, Spanish Fork, Utah 84660, this
15 day of March, 1976.

Madge Griffin